Supreme Court, U.S.
FILED
JUN 8 1993
OFFICE OF THE CLERK

No. 92-1692

In The

Supreme Court of the United States

October Term, 1992

CITY OF ELY, CONSERVATIONISTS WITH COMMON SENSE, INC.; F.B. HUBACHEK, JR.; WILDERNESS OUTFITTERS, INC.,

Petitioners,

v.

FRIENDS OF THE BOUNDARY WATERS WILDERNESS, et al.,

Private Respondents,

and

F. DALE ROBERTSON, CHIEF OF THE UNITED STATES FOREST SERVICE; MIKE ESPY, SECRETARY OF AGRICULTURE,

Federal Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY OF PETITIONERS, F.B. HUBACHEK, JR. and WILDERNESS OUTFITTERS, INC., TO BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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These Petitioners respectfully submit that it is inappropriate for the Federal Respondents to oppose the Petition For Writ of Certiorari in this instance. The Federal Respondents admit that the Eighth Circuit erred in its construction of the word "feasible" in the Boundary Waters Canoe Area Wilderness Act. The decision is not limited to one geographical area and a mere 13,000 people. It affects every person in the United States who wishes to use the Boundary Waters Canoe Area Wilderness and, particularly, all persons over middle age or with any handicap whatsoever. In addition, the decision does point the way for other courts to avoid the doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This argument is valid whether or not this Court considers the Fifth Amendment taking argument. However, the Petitioners merely pointed out a rule of construction; do not adopt an unconstitutional construction of a statute where another reasonable and constitutional construction is possible.

The Petitioners should not be bound by the Federal Respondents' priorities and this Court should not be influenced by what the Justice Department believes is important. An act of Congress permitting small outboard motors on the two lakes has been effectually amended. *Chevron* has been avoided and any result-oriented court which desires to do so can follow the path of the Eighth Circuit and interpret the law to secure the desired result. Frankly, these Petitioners are shocked by the casual attitude of the Federal Respondents that the decision is wrong but it is not important enough (to the Justice Department) to bother with. Any palpable injustice is worth correcting, and one involving a federal statute, a

federal agency and federal lands, as well as affecting administrative law, thousands of people and a regional economy, is worth correcting by the Supreme Court, notwithstanding its crowded docket. Certiorari should not be denied because of some perceived quota of certiorari petitions to be supported by Justice. The Required Statement For Rehearing *En Banc* filed in the Eighth Circuit on Petition For Rehearing by the attorney of record for the Federal Appellees is attached as an addendum.

In that instance the Federal Appellees certified that the appeal raised questions of "exceptional importance" and these Petitioners respectfully submit that they remain of extreme importance, not only to the area but to the federal administrative agencies and the nation.

These Petitioners sincerely believe that the plaintiffs, including the Sierra Club, The Wilderness Society and the Izaak Walton League and environmental groups with hundreds of thousands of members unconsciously influenced the Court of Appeals with non-existent and impermissible environmental considerations. The plain legal error of the Circuit Court is an injustice which should be corrected.

Respectfully submitted,

BENNETT A. WEBSTER

Attorney for Petitioners,
F.B. Hubachek, Jr. and
Wilderness Outfitters, Inc.

ADDENDUM

REQUIRED STATEMENT FOR REHEARING *EN BANC*
(8th Cir. R. 35A(c)(2))

I express a belief, based on a reasoned and studied professional judgment, that the decision is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit and the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Voyageurs Region National Park Association v. Lujan,* 966 F.2d 424 (8th Cir. 1992); *Chevron U.S.A. v. Natural Resources Defense Council,* 647 U.S. 402 (1971); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971); *Garcia v. United States,* 469 U.S. 70, 76 (1984).

I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:

1) whether the word 'feasible' is defined as a matter of law to mean 'physically possible'; and

2) whether this Court should reverse a district court and an administrative determination that permitted the continued operation of three motorized portages in the Boundary Waters Canoe Area Wilderness, a decision that affects approximately 13,000 visitors to the Boundary Waters.

Peter A. Appel
Attorney of Record for
Federal Appellees